88- 1815

Supreme Court, U.S.
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No. 89-_____

In the

Supreme Court of the United States

October Term, 1989

DENNIS NAPIERALSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in upholding the admission of diary entries made by an unidentified declarant where it was never established that the entries were made in furtherance of a conspiracy.

2. Whether the Eighth Circuit erred in permitting the introduction of evidence suggesting that Petitioner attempted to defraud the government when said conduct had nothing to do with the alleged marijuana conspiracy.

3. Whether the Eighth Circuit erred in permitting the introduction of tape recorded telephone conversations between government agents and a caller when the government agents secured access to the home and to the phone by material misrepresentations.

4. Whether the Eighth Circuit erred in upholding the denial of Petitioner's motion to sever the trial from that of his Co-Defendants.

5. Whether the Eighth Circuit erred in approving the exclusion of expert testimony concerning inaccuracies in a tape recorded conversation containing incriminating statements attributed to Petitioner.

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No. 89-_____

In the

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DENNIS NAPIERALSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are those set forth in the caption on the cover of this petition.

OPINIONS BELOW

The Petitioner was convicted of conspiracy to manufacture and distribute marijuana and manufacture of marijuana on August 20, 1987 following a jury trial. Petitioner appealed and the Eighth Circuit Court of Appeals affirmed in a decision filed on March 8, 1989 (A-1).

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. 1254 (1), which provides for review by certiorari "upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree". The Eighth Circuit Court of Appeals entered its decision on March 8, 1989.

STATUTES INVOLVED

21 United States Code 846
21 United States Code 841
18 United States Code 2
U.S. Constitution Amendment IV
U.S. Constitution Amendment V
U.S. Constitution Amendment VI
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STATEMENT OF THE CASE

Dennis Napieralski was convicted, following a jury trial of conspiring to manufacture and distribute marijuana in violation of 21 U.S.C. 846 and manufacturing marijuana in violation of 21 U.S.C. 841 and 18 U.S.C. 2. The date of conviction was August 20, 1987. On October 28, 1987, he was sentenced to serve five years on each conviction, the sentences to be served concurrently. He was released pending appeal on November 10, 1987. On March 8, 1989, the Eighth Circuit Court of Appeals affirmed his conviction.

With co-defendants Dale Mason, Nancy Mason and John Borton, Mr. Napieralski was accused of building and maintaining a hydroponics operation in Bovey, Itasca County, Minnesota. Dennis Napieralski is the owner of Napieralski Forestry. Napieralski is engaged in reforestation throughout the country for entitites such as the United States Forest Service, the Department of Natural

Resources, and Boise Cascade (A. 42-43)*. In Minnesota Blandin Paper uses Napieralski Forestry crews to do replanting (A. 42-43). The Company plants over one million trees per year (A. 46). The actual replanting typically occurs in May of the year (A. 46). One of Dennis Napieralski's Minnesota employees testified that he had worked on a small crew of four people (A. 63). The crew had worked independently, and was visited once by Dennis Napieralski, who gave them a credit card for expenses and helped them cash checks (A. 64).

In May 1986, Mr. Napieralski contacted a realtor in Itasca County, Minnesota, describing a particular property [hereinafter Bovey property] and asking if the realtor would show him the property (A. 49-50). The realtor was unable to do it at the time but gave Mr. Napieralski information about the property (A. 50). Mr. Napieralski called the realtor subsequently, and asked more questions about the property (A. 51). He entered into negotiations for its purchase contingent on his brother Ken Napieralski seeing the property (A. 51). Ken Napieralski did view the property and advised Dennis to proceed with the sale (A. 52). Dennis Napieralski also visited the property prior to closing (A. 53). Because the property had been on the market for a long time, Mr. Napieralski was able to negotiate an extremely favorable purchase price (A. 56-58). At the closing on July 25, 1986, he told the realtor that he did reforestation in the area and that he would like to have a base (A. 54). Mr. Napieralski indicated that he was going to build a garage there and make the windows larger in the master bedroom so that he could view the lake (A. 59).

A search warrant was obtained and executed at the property on March 11, 1987. A hydroponics operation was discovered in the basement (A. 22). Dale and Nancy Mason were occupying the premises (A. 23). A variety of items were seized but Dennis Napieralski's fingerprints were not identified on any of these items (A. 27). Neither photographs nor personal papers of Dennis Napieralski were seized at the residence (A. 27).

Among the items seized were notebooks called day-timers. The defense objected to introduction of these day-timers because they were never authenticated (A. 24, 26). The government's theory is

*Reference to trial transcript will be denoted (A. page number).

that they were written by Dale and Nancy Mason, and so the defense objected to their introduction in evidence on hearsay grounds as well (A. 24, 26). Dennis Napieralski's counsel was unable to cross-examine the purported authors of the day-timer diaries because the Masons did not testify at trial (A. 24, 26).

The government presented the day-timer entries to the jury by enlarging them and projecting them on a screen (A. 28). A major percentage of the government's case was devoted to emphasizing the day-timer entries. One of the day-timer authors wrote that he met Dennis on August 1, 1986 (A. 29). On July 26th, the author made a note, "DN. Called okay 4k over project. Reviewed plans." (A. 29). On September 10, 1986, the author wrote, "Revised cost figures. Projected completion 100%. $100,000.00. [abbreviation which federal agent interpret as Dennis Napieralski] called not terribly shocked" (A. 30). On September 18, the author wrote, "Nancy, Dennis and I went to Grand Rapids Bank... 50-50%. Dennis Napieralski D.M." (A. 31). According to the day-timers' author, on October 16, 1986, the garage started going up (A. 38). On October 27, "Den. Nap. called lost contract" (A. 38). On October 3, the author made an entry, "Den. Nap. called got the contract 90%" (A. 38).** On November 19, the author noted, "Babies ready now" (A. 39). On December 22, there is an entry, "Got a check from Dennis" (A. 34). There is no indication that Dennis Napieralski was up at the property until January, when there was a note dated January 2, "Picked Dennis Napieralski up at airport" (A. 35, 40). At that time, according to the diaries Dennis was participating in cutting dollies up and moving containers onto the dollies (A. 35). On January 7, it was noted that "Den did pruning" (A. 36). On January 9, the author noted, "Den's understanding of J.B.'s 10 = cost first" (A. 36). On January 25 there was a note, "Den washed medium... Den drilled for wheels" (A. 37). On January 27 there was a note, "Den and I talked about J.B.'s percent project X". After his lengthy and dramatic presentation of these entries, the prosecutor reviewed them in detail and elaborated them into a closing argument that Dennis Napieralski, in fact, had

**The agent describing the day-timer entries for the jury conceded the reference could have been to a tree planting contract (A. 42).

been an active participant in a marijuana distributing conspiracy (A. 65-72).

In addition to seizing the day-timers, police answered the telephone at Dale Mason's residence on March 11, 1987 (A. 31-32). Defense counsel unsuccessfully objected to the introduction of these calls in evidence (A. 33). The jury therefore learned of Mr. Napieralski's statements to the police that "I'm the owner of the projects... Are you working down in the basement?... Someone else working... how do you like it? Impressive, huh? The only problem I see is how tight of lip you have." (A. 72). These statements were used against Mr. Napieralski as the climax to the Assistant United States Attorney's closing argument (A. 72).

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Issues Concerning A Defendant's Sixth Amendment Right To Confront And Cross-Examine Witnesses Against Him.

The day-timers or diaries admitted into evidence were alleged to have been written by co-defendants Dale and Nancy Mason. Two of the day-timers did not even purport to identify a particular individual or address. No one with personal knowledge regarding the day-timers identified them at trial, nor was the handwriting in the day-timers identified as being that of any of the co-defendants. Even if it were assumed that the government might have been able to provide the foundation to establish that the day-timers were created by the Masons, the government failed to prove that the statements fell within the co-conspirator exception to the hearsay rule. The introduction of this evidence against Napieralski denied him his Sixth Amendment right to confront and cross-examine the declarants incriminating him.

Before a co-conspirator's statement may be admitted, the trial court must satisfy itself that the statement falls within the exception to the hearsay rule. The court must make a finding that the defendant was involved in it, and that the statement was made in

the course of and in furtherance of the conspiracy. This finding must be made by the court before the statement is admitted. *Bourjaily v. U.S.*, 107 S. Ct. 2775 (1987). The trial court did not make the findings required by *Bourjaily*.

The Eighth Circuit acknowledged the trial court's failure but dismissed the error as nonprejudicial, stating that no prejudice had been alleged by Napieralski. To the contrary, it was argued to both the trial court and Eighth Circuit that there was extreme prejudice to defendant because there was no basis for a finding that the day-timers were made in furtherance of a conspiracy with him. The day-timers were kept like personal diaries and no one testified concerning the meaning of the notes. It would have been sheer speculation to conclude that these notes were necessary to a hydroponics operation allegedly involving four people.

The cases relied upon the Eighth Circuit, *United States v. DeLuna*, 763 F. 2d 897 (8th Cir. 1985), and *United States v. Lewis*, 759 F. 2d 1316 (8th Cir. 1985), provide no support for its decision. In *DeLuna*, the Court based its findings that the co-conspirator's notes were made in furtherance of a conspiracy on the fact that a witness testified at length about the co-conspirator's activities in the conspiracy and how the notes specifically referred to those activities. There was no such testimony in this case. In *Lewis*, the ledger admitted into evidence was in fact identified by several witnesses who testified that the handwriting in the ledger was that of two particular individuals. Again, there was no such testimony in this case.

The Eighth Circuit's decision glosses over an essential issue, that is, whether the day-timers were made in furtherance of a conspiracy or whether they were merely narratives. This case does not involve a complicated casino skimming scheme, cf. *United States v. DeLuna, supra*, nor were the notes part of sophisticated accounting records essential to a criminal enterprise. The Eighth Circuit acknowledged that the day-timers contained entries unrelated to marijuana growing.

This case presents the Court with the opportunity to insist that the findings required by *Bourjaily* be made and that there be a showing that the entries or notations furthered a conspiracy and were not merely narratives.

II. This Case Presents An Important Question Of First Impression Concerning The Admissibility Of Tape Recorded Telephone Conversations Secured Through A Warrant Based Upon Material Misrepresentations.

During the execution of a search warrant a B.C.A. agent answered the phone and tape recorded two phone conversations with an individual alleged to be Napieralski. Although 18 U.S.C. 2511 (2)(c) allows the interception of a communication by a person "acting under color of law" or where such person is a party to the communication, in this case the agent was on the premises under the authority of a defective search warrant. The affidavit submitted to the judge issuing the warrant contained material misrepresentations. The affidavit contained the following statement:

> "Your affiant has further contacted a DEA agent in Arkansas, being Larry Carver, this being done on March 6, 1987, and Searcy County Sheriff, who reported that Dennis Napieralski had a reputation for growing marijuana..."

A defense investigator contacted Sheriff Griggers, who denied that he had made any such statements to Agent Carver of the DEA in Arkansas or any other law enforcement agent. The evidence regarding Sheriff Griggers remained unrebutted, establishing that affidavits supporting the warrant in this case contained material misrepresentations. Had these misrepresentations not been made, the warrant would not have been issued. *United States v. Leon*, 468 U.S. 897 (1984).

A homeowner has a legitimate expectation of privacy concerning calls made on his home telephone. *Katz v. United States*, 389 U.S. 347 (1967). When affirmative misrepresentations are made by government agents in order to accomplish entry into the premises, the privacy rights of the individual homeowner should prevail and the taped conversations excluded as evidence. The defendant objected to the introduction of this evidence at trial and argued this issue to the Eighth Circuit. The Eighth Circuit did not specifically address this issue in its decision, and made only a conclusory

reference to the issue by stating that the other arguments had no merit.

The cases cited by the government, *United States v. Passarella*, 788 F. 2d 377 (6th Cir. 1986), and *United States v. DeLutis*, 722 F. 2d 902 (1st Cir. 1983), do not address the issue. In those cases the government agents made no affirmative misrepresentations to gain entry to a home. This case poses an important challenge to the Court to protect the privacy interests of homeowners against unwarranted invasions.

III. The Eighth Circuit's Summary Dismissal Of Substantial Evidentiary Questions And Severance Issue Conflict With Its Own Precedents And The Defendant's Right To A Fair Trial.

A. The introduction of evidence suggesting that Napieralski attempted to defraud the government on a homestead application denied him a fair trial.

Two witnesses were allowed to testify about how Napieralski attempted to file a homestead application when he was not living on the property. Misconduct involving a homestead application involves activity that is in no way similar to the activities charged in this case. Before evidence of other misconduct or crimes is admitted, the government must show that: 1) an issue on which the other crime's evidence may be received is raised; 2) that the proferred evidence is relevant to that issue; 3) that the evidence is clear and convincing; and 4) that its probative value outweighs the prejudicial impact of the evidence. *United States v. Clemons*, 503 F. 2d 486 (8th Cir. 1974). None of these requirements were met in the instant case and the result was no more than character assassination by the government. Napieralski was not allowed to establish his reputation for truthfulness in the community after this attack. When evidence of other misconduct has no bearing upon any of the issues in a case, the conviction should be reversed. *United States v. Young*, 618 F. 2d 1289 (8th Cir. 1980).

B. The trial court's exclusion of expert testimony showing inaccuracies in a tape recorded conversation attributed to Napieralski denied him a fair trial.

Rule 702 of the Federal Rules of Evidence provides that when scientific or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a qualified witness may testify thereto in the form of an opinion or otherwise. Testimony of a linguistic expert was offered by defendant to show that the transcript of tape recordings of telephone calls attributed to him was not accurate. The professor would have testified that significant mistakes were made in transcribing the record and that these mistakes prejudiced the whole understanding of the recording.

Fed. R. Ev. 702 provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereon in the form of an opinion or otherwise."

The test is simply whether the expert testimony would be helpful to a trier of fact. Clearly, the testimony of the linguistics expert offered by Mr. Napieralski's counsel would have been helpful to the jurors. Use of a transcript clearly is suggestive to the jurors listening to tape recordings which are fuzzy in spots. The jurors do not have the opportunity that an expert has to study the tapes, amplify them, and listen to them over and over until there is reasonable certainty regarding what is being said on unclear portions.

The test for the admissibility of expert testimony is no longer whether the subject matter is within the common knowledge of the average layman. There is no bright line separating issues within the comprehension of jurors from those that are not. *See e.g., Bauman v. Volkswagenwerk Aktiengesellschaft,* 621 F. 2d 230, 234 (6th Cir. 1980). For example, jurors are capable of comparing features in surveillance photographs with features of a defendant seated

in a courtroom. Nevertheless, expert witnesses have been able to offer additional assistance in interpreting the photographs. *United States v. Cairns*, 434 F. 2d 643 (9th Cir. 1970). In *United States v. Barrett*, 703 F. 2d 1076, 1084 n. 14 (9th Cir. 1983) a photographic expert was properly permitted to testify regarding detailed similarities between clothing seized from a defendant and that worn by a robber in a surveillance photograph. The expert's testimony about similarities between the tonal condition, style, and placement of buttons, stripes and stains satisfied the helpfulness test. There is no significant difference between the kind of testimony permitted in *Barrett* and that performed in the instant case.

The expert in this case would have presented information helpful to the jurors in understanding tape recordings which were unclear. The decision to exclude this testimony was clearly erroneous and denied defendant his right to a fair trial.

C. The refusal to sever Napieralski's trial from that of the co-defendants was prejudicial error.

In the instant case, the most incriminating evidence against Dennis Napieralski were the day-timers which the government attributed to co-defendants Dale and Nancy Mason. Because Mr. Napieralski was tried with the Masons, he was unable to call them to the witness stand and cross-examine them regarding the contents of the day-timers entries. This clearly prejudiced Mr. Napieralski. In *United States v. Mims*, 812 F. 2d 1068 (8th Cir. 1987), this Court said that a joint trial clearly prejudices a defendant if his co-defendant would have offered exculpatory evidence on his behalf if there had been separate trials.

Dennis Napieralski did not live at the premises where marijuana was seized. The Masons lived there and were present when the search warrant was executed. Outside of the day-timers entries and telephone conversation with Agent Hopps, the evidence in this case almost uniformly related to the Masons. Severance is justified where a jury cannot be expected to compartmentalize evidence as it relates to separate defendants. *United States v. Cova*, 585 F. Supp. 1187 (D. Mo., 1984). Such was the case here. The introduction of the

evidence against various defendants as a unit created an inference of guilt by association which tainted the government's presentation with respect to Mr. Napieralski.

Severance is required where a defendant's right to a fair trial is put at risk in the joint trial context. *United States v. Voss*, 787 F. 2d 393 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 286. Because Mr. Napieralski's right to a fair trial was put at risk by joinder with his co-defendants for the purposes of trial, the Eighth Circuit erred in refusing to reverse Mr. Napieralski's conviction.

Each error alone, or the cumulative prejudicial impact of these errors, deprived Napieralski of his basic right to a fair trial. In ignoring its own precedent and summarily affirming the trial court on these issues, the Eighth Circuit committed reversible error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

April 28, 1989.

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APPENDIX

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In the

United States Court of Appeals For The Eighth Circuit

No. 87-5463

UNITED STATES OF AMERICA,

Appellee,

v.

DALE IRVING MASON,

Appellant.

No. 87-5464

UNITED STATES OF AMERICA,

Appellee,

v.

DENNIS JOHN NAPIERALSKI,

Appellant.

No. 87-5001

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN H. BORTON,

Appellant.

No. 87-5002

UNITED STATES OF AMERICA,

Appellee,

v.

NANCY LEE MASON,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: October 17, 1988

Filed: March 8, 1989

Before HEANEY,* FAGG, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

After a joint jury trial, Dale Mason, Nancy Mason, Dennis Napieralski, and John Borton were convicted of conspiracy to manufacture and distribute marijuana in violation of 21 U.S.C. § 846. Dale Mason and Borton were convicted of distribution of marijuana in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Dale Mason, Nancy Mason, and Napieralski were convicted of manufacturing marijuana in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Finally, Dale Mason and Nancy Mason were convicted of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. All four defendants appeal their convictions. We affirm.

*The Honorable Gerald W. Heaney was an active judge of the Eighth Circuit on the date this case was submitted, but took senior status on January 1, 1989, before the decision was filed.

I.

On September 6, 1986, the Itasca County, Minnesota Sheriff's Department received a teletype message from the Indiana State Police stating that an informant had told them that an underground greenhouse was to be built in Itasca County for the purpose of growing marijuana. The informant provided the telephone number of the persons constructing the project and stated that two of the persons involved would be Dale Mason and John Borton.

The Sheriff's Department conducted a follow-up investigation and discovered that the telephone number was assigned to a property at which Dale Mason received mail. They learned that Dennis Napieralski had purchased this property in July of 1986 without viewing the interior of the house and had, through Dale Mason, applied for and received a building permit. Additional investigation into Dale Mason's energy consumption and hardware purchases suggested that he had constructed and was operating a greenhouse.

The Sheriff's Department obtained a search warrant, which agents of the Sheriff's Department and the Minnesota Bureau of Criminal Apprehension (BCA) executed on March 11, 1987. The agents found Dale Mason at home and discovered in the basement a sophisticated hydroponic marijuana growing facility containing several hundred marijuana plants in various stages of growth.

The agents seized several pocket day-timers from the house's living area. The day-timers, compiled by Dale and Nancy Mason on a daily basis, contain numerous entries regarding the construction and operation of the hydroponic project. For example, various entries describe the work done by different individuals on the project, progress that had been made in construction of the facility, the rate of growth of the marijuana plants, the expected costs of completing the project, the expenses incurred, and the formula by which profits would be distributed. The day-timers contain numerous incriminating references to the activities of, among other people, "Dennis Napieralski," "Den Nap," "Dennis," "J.B.," and John." The day-timers also contain entries unrelated to the marijuana growing facility.

II.

For reversal, the Masons contend that the day-timers are private papers, the contents of which are protected by the fifth amendment. They cite *Boyd v. United States*, 116 U.S. 616, 633 (1886), for this proposition. The scope of the *Boyd* doctrine has been significantly eroded by more recent decisions, however. "If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." *United States v. Doe*, 465 U.S. 605, 612 n.10 (1984); *Andresen v. Maryland*, 427 U.S. 463, 473-77 (1976).

The Masons argue that *Doe* and *Andresen* involved business records and that the Fifth Amendment continues to protect the contents of personal papers such as diaries. We need not decide this matter, for "if contents are protected at all, it is only in rare situations, where compelled disclosure would break 'the heart of our sense of privacy.'" *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.) (quoting *Doe*, 465 U.S. at 619 n.2 (Marshall, J., concurring in part)), *cert. dismissed*, 473 U.S. 925 (1985); *see also In re Steinberg*, 837 F.2d 527 (1st Cir. 1988), for a careful analysis of the Supreme Court's most recent pronouncements on the *Boyd* doctrine.

The district court[1] adopted and affirmed the following finding by the magistrate:[2] "The documents seized in the residence were 'pocket day-timers,' calendars generally used to note appointments and reminders.... The government asserts the notations relate to the cultivation of marijuana. Certainly from the court's examination of the materials they are not personal diaries...." Magistrate's Report and Recommendation of June 12, 1987, at 10. We cannot say that this finding is clearly erroneous. *See Steinberg*, 837 F.2d at 530; *Butcher*, 753 F.2d at 469. We therefore reject the Masons' argument that admission of the day-timers violated their rights under the fifth amendment.

---

[1] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

III.

Borton and Napieralski also challenge admission of the day-timers. They argue that the district court erred by failing to make an explicit determination for the record regarding the admissibility of the day-timers under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). *See United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978). They also contend that the statements in the day-timers did not further the conspiracy, as required by Rule 801(d)(2)(E).

We will not reverse for failure to follow the procedures established in *Bell* absent a showing of prejudice. *See United States v. Cerone,* 830 F.2d 938, 952 (8th Cir. 1987), *cert. denied sub nom., Aiuppa v. United States,* 108 S. Ct. 1730 (1988). Because Borton and Napieralski fail to allege any prejudice from the court's failure to follow the *Bell* procedures, we must reject their argument. We also are unpersuaded by their contention that the statements in the day-timers were not made in furtherance of the conspiracy. *See United States v. DeLuna,* 763 F.2d 897, 909 (8th Cir.) (cryptic notes referring to meetings, telephone conversations, and disbursements of funds furthered conspiracy), *cert. denied,* 474 U.S. 980 (1985); *United States v. Lewis,* 759 F.2d 1316, 1339 (8th Cir.) ("[a]ccounting records are essential even for a criminal enterprise's continued vitality"), *cert. denied,* 474 U.S. 994 (1985). We therefore conclude that this evidence was properly admitted.

IV.

After receiving the teletype from the Indiana State Police, the Itasca County Sheriff's Department asked the Indiana authorities to run the name "John Borton" through their computer. The Indiana authorities reported that the only "John Borton" in their record system was "John H. Borton." Subsequent investigation did not link "John H. Borton" to the hydroponic operation. Defendant Borton's middle initial is "R." Because the original indictment inadvertently listed it as "H," the government, at the close of evidence,

sought and received permission to delete the middle initial. Borton contends that this ruling constituted reversible error.

Although the general rule is that a court may not amend an indictment, that rule is inapplicable when the change is one of form only. *United States v. Sazenski*, 833 F.2d 741, 743-44 (8th Cir.), *cert. denied*, 108 S. Ct. 1079, 1083 (1988). Misnomers generally are mistakes of form that may be corrected by amending the indictment. *See e.g., United States v. Young Bros., Inc.*, 728 F.2d 682, 693 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984); *United States v. Kegler*, 724 F.2d 190, 194 (D.C. Cir. 1983); *United States v. Janoe*, 720 F.2d 1156, 1160 (10th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). "Furthermore, a finding of prejudice to the defendant must be present before an amendment is held impermissible." *United States v. Burnett*, 582 F.2d 436, 438 (8th Cir. 1976); *see also United States v. Krall*, 835 F.2d 711, 715 (8th Cir. 1987).

The amendment in this case was one of form only. Borton does not argue that he was not the individual indicted by the grand jury, and the amendment in no way changed the substance of the indictment. Moreover, we are unable to perceive how Borton could have been prejudiced by the amendment. He argues that his primary defense was mistaken identity—that "J.B." and "John" in the day-timers referred to another John Borton—and that the amendment at the close of evidence stripped him of that defense. The amendment, however, in no way affected the state of the evidence or limited Borton's ability to argue mistaken identity to the jury. In fact, Borton's counsel developed this argument in considerable detail in his closing argument. Accordingly, we find no error in the district court's ruling allowing the amendment.

V.

We have reviewed appellants' additional arguments and find them to be without merit. Accordingly, we affirm the convictions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court
District of Minnesota
Fifth Division

Criminal No. 5-87-10

UNITED STATES OF AMERICA,

Plaintiff,

v.

DENNIS NAPIERALSKI,
DALE IRVING MASON, and
NANCY LEE MASON,

Defendants.

John M. Lee, Assistant U.S. Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, for plaintiff;

Bruce Hanley, Esquire, 701 Fourth Ave. So., Suite 1400, Minneapolis, MN 55415, for defendant Napieralski;

Scott Tilsen, Esquire, 174 U.S. Courthouse, Minneapolis, MN 55401, for defendant Dale Mason; and

Mark Peterson, Esquire, 608 Second Ave. So., Suite 380, Minneapolis, MN 55409, for defendant Nancy Mason.

Before the court are defendant's motions to suppress evidence seized pursuant to a search warrant at a residence located seventeen miles north of the junction of Itasca County Road 7 and state highway 169 (hereinafter residence). All of the defendants contend that the affidavit supporting the warrant does not set

forth probable cause for the search. Defendant Napieralski contends there is a false statement in the affidavit and requests a hearing on that issue. He also alleges that the government violated his Fourth Amendment rights when they tape recorded two telephone conversations while the search warrant was being executed. He seeks suppression of those conversations. Dale and Nancy Mason allege that the agents executing the warrant seized personal diaries in violation of the Fourth Amendment while executing the search warrant. The warrant was issued by a State District Judge.

Initially the government challenges the standing of defendant Napieralski to question the validity of the search of the residence. The affidavit supporting the warrant and other materials submitted to the court establish that Napieralski was the purchaser of the residence which was occupied by his co-defendants Dale and Nancy Mason. The record does not indicate whether the Masons had leased the residence or occupied it with the permission of Napieralski. Further, the record does not indicate whether Napieralski was a joint occupant of the premises with the Masons. While it is questionable whether mere purchase of the property is sufficient to confer standing on Napieralski, the court will assume he has sufficient interest to object to the search.

Defendant Napieralski alleges there is a false statement in the affidavit of Special Agent Richard Ripley of the Drug Enforcement Administration which was filed in support of the search warrant. Ripley's affidavit recites that he received information from an Arkansas DEA Agent that the sheriff of Searcy County, Arkansas stated that Napieralski had a reputation for growing marijuana. The affidavit of Napieralski's investigator states that he interviewed the sheriff of Searcy County who denied making such a statement. The defendant seeks an evidentiary hearing.

Defendant must, to obtain a hearing, make a substantial preliminary showing of an intentional or reckless falsehood in the affidavit and show that setting aside the allegedly false statements the affidavit lacks probable cause. *Franks v. Deleware*, 438 U.S. 154, 171-72 (1978); *United States v. Wajda*, 810 F.2d 754, 759-60 (8th Cir. 1987). The defendant has, as will be shown below, failed to demonstrate that the affidavit lacks probable cause with the allegedly false statements set aside. Because defendant has failed to

meet one of the *Franks* tests, no hearing is required.

The questions of whether the affidavit sets forth probable cause will be considered next. The affidavit, with the questioned information set aside, contains the following:

> 1. The Itasca County Sheriff's Office received a teletype from the Indiana state police stating an informant had told them there was an underground greenhouse to be built in Itasca County for the growing of marijuana. The informant said the dimensions of the building were 30 x 60 feet, owners of the property were unknown, but the telephone number of the people involved was 218-245-3094. The informant said two of the people involved would be Dale Mason and John Borton. No information on the informant's background was set forth in the teletype. A copy of the teletype was attached to the affidavit.
>
> 2. A Deputy Sheriff learned that the subscriber for the telephone at the residence was Lee Stensma.
>
> 3. A rural mail carrier advised that Stensma got mail on Itasca County Road 7, seventeen miles north of its junction with state highway 169, and that Dale Mason also received mail at that location.
>
> 4. The former owner of the residence told the Sheriff's Office she sold the property to Dennis Napieralski on July 25, 1986. Napieralski told the former owner he was from Arkansas. A check of county records indicated that Napieralski had obtained a building permit to construct a 24 x 24 garage and the application had been filed by Dale Mason.
>
> 5. A check of the power utility revealed that Dale Mason was responsible for electrical usage at the property. An official with the electrical utility told the Sheriff's Office that electrical usage at the residence was much higher than is the normal for the residence for the months December through mid February. The company also advised that because of heavy electrical usage they had to install a larger transformer to serve the residence.

6. One of the owners of the local hardware store told the Sheriff's Office that Dale Mason had purchased a large quantity of pipe and fittings and because he wanted the materials as soon as possible arranged to pick them up in Minneapolis. Copies of the orders for this material was attached to the affidavit.

7. Mason also told the hardware store owner he wanted to purchase growing lights because they were setting up a greenhouse to grow trees.

8. The Sheriff's Office of Itasca County received multiple hearsay through cooperative citizens that Dale Mason had purchased 661 gallons of fuel oil on January 30, 1987, and 680 gallons on February 26, 1987. He told the delivery man that the fuel oil was for generating electricity because of the high cost of purchasing power.

9. The Sheriff's Office learned from the seller of the home that defendant Napieralski has negotiated a purchase price of $46,000 without looking at the interior of the house. He also wanted immediate possession.

10. Agent Richard Ripley of the Drug Enforcement Administration stated in his affidavit that he was familiar with the growing of marijuana in greenhouses. He recited that marijuana plants need lots of water, fertilizer, light, and heat.

11. Agent Ripley also stated that grow lights use large amounts of electricity and that the usage at the residence is consistent with providing the environment necessary for expeditious growth of marijuana plants.

12. Agent Ripley also stated that the pipe and fittings purchased by Dale Mason is consistent with an irrigation type system for growing marijuana indoors. Of particular significance was the purchase of a timing valve which would insure delivery of fertilizer to the plants at the proper time.

13. Agent Ripley stated that growing time for marijuana plants is approximately 22 weeks and from a review of the electrical and fuel oil usage, the plants

were, at the time the warrant was applied for, from 16-19 weeks into their growing period.

When an application for a search warrant is made to a magistrate his duty is to determine whether, given all the circumstances set forth, there is a fair probability evidence of a crime will be discovered in a particular place. The role of a reviewing court is to establish that the magistrate had a circumstantial belief for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In making the determination of probable cause the inquiry is not whether conduct is innocent or guilty but the degree of suspicion that attaches to particular types of non-criminal acts. *Id* at 243, n.13.

The information that Dale Mason was an occupant of the residence and the telephone number at the premises supplied by the Indiana state police tipster was verified by the Itasca County authorities when they learned that Mason received mail at the residence and the telephone number listed to that residence. Further confirmation of the tip was supplied when the authorities learned that Mason had purchased materials consistent with a system to grow marijuana indoors.

Of particular significance was the timing device to insure proper plant feeding. The unusual amounts of electricity and fuel oil used at the residence was consistent with the marijuana growing operation according to Agent Ripley who had extensive training in the subject.

To be sure at least some of those facts might be consistent with growing tree seedlings however when considered with the information from the informant they furnish probable cause to believe that evidence of crime would be found in the residence. Moreover the finding is buttressed by the fact that Napieralski purchased the house without examining the interior suggesting he was interested in the remote location in order to prevent detection. Thus substantial basis existed for the magistrate's finding that the affidavit supporting the search warrant set forth probable cause.

Defendant Napieralski moves to suppress two telephone conversations between Greg Hopps, an agent of the Minnesota Bureau of Criminal Apprehension, and a person purporting to be Napieralski. The conversations were tape recorded. The defendant argues

that the conversations must be suppressed because neither of the Masons who occupied the premises or Lee Stensma in whose name the telephone was listed consented to the interception of the telephone calls. Defendant also argues that since the search warrant was invalid the agent was on the premises illegally and could not answer the phone. The court has found that the search warrant is valid and this portion of defendant's claim is rejected.

Since the agents were legally on the premises executing a valid search warrant, the issue is whether Napieralski had a reasonable expectation of privacy with respect to the phone conversation. *See Katz v. United States*, 389 U.S. 347 (1967). An expectation of privacy is one which is free from all intrusions, not just unwarranted intrusions. *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977).

When the call was placed by Napieralski he did not know who would answer the phone thus when he chose voluntarily to talk to that person he exposed the conversation to someone who might deceive him as to his identity and reveal the conversation's contents. He thus had no expectation of privacy in those conversations. *See United States v. White*, 401 U.S. 745 (1971); *United States v. Muchenthaler*, 584 F.2d 210 (8th Cir. 1978); *United States v. Fuller*, 441 F.2d 755, 760-61 (4th Cir. 1977); *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979). Napieralski's claim that the conversations were illegally intercepted must be rejected.

The Mason defendants move to suppress what they contend are personal diaries on the ground their seizure violates the Fourth and Fifth Amendments. They rely on *Boyd v. United States*, 116 U.S. 616 (1886) in support of their argument. In *Boyd* the court said at p. 633:

> [W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially difference from compelling him to be a witness against himself.

Defendant's Fifth Amendment claim was rejected in *Andreson v. Maryland*, 427 U.S. 463 (1967). State authorities had in *Andresen* obtained a warrant to search defendant's law office and corporate

office for documents relating to a fraudulent land sale. The papers seized were admitted at trial and defendant was convicted. The Supreme Court held there was no Fifth Amendment violation because defendant was not compelled to do anything with respect to the records records were business records, it seems clear that the same principle, lack of compulsion, must apply to personal records obtained and introduced into evidence without the defendant's assistance.

The question of whether diaries and personal letters are immune from discovery was not reached in *Andreson*. The issue is of more concern since the Supreme Court in *Wardin v. Hayden*, 387 U.S. 294 (1967) held that the "mere evidence" in addition to instrumentalities and fruits of crimes, and contraband could be seized under the Fourth Amendment.

We need not resolve the question here. The documents seized in the residence were "pocket day-timers," calendars generally used to note appointments and reminders (representative samples have been attached to the government's memorandum). The government asserts the notations relate to the cultivation of marijuana. Certainly from the court's examination of the materials they are not personal diaries, whose examination concerned the court in *United States v. Bennett*, 409 F.2d 888,897 (2nd Cir. 1969).

RECOMMENDATION

Based upon the foregoing, IT IS RECOMMENDED THAT:

1. Defendant Napieralski's motion for a *Franks* hearing be DENIED;

2. The motion of defendants Dale and Nancy Mason and defendant Napieralski to suppress evidence because the search warrant was not supported by probable cause be DENIED;

3. That defendant Napieralski's motion to suppress telephone conversation be DENIED;

4. The motion of Dale and Nancy Mason to suppress and have returned the calendars by DENIED.

Dated: June 12, 1987

J. EARL CUDD
UNITED STATES MAGISTRATE

Pursuant to Local Rule 16C2 any party may object to this Report and Recommendation by filing with the Clerk of Court and serving all parties within ten days, a writing which specifically identifies those portions of this Report to which objections are made and the basis of that objection. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of th hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and cause to be filed a complete transcript of the hearing.

United States District Court
District of Minnesota
Fifth Division

Criminal No. 5-87-10

UNITED STATES OF AMERICA,

Plaintiff,

v.

DENNIS NAPIERALSKI,
JOHN H. BORTON,
DALE IRVING MASON, and
NANCY LEE MASON,

Defendants.

ORDER

Before the court are defendant's motions for discovery, disclosure, and inspection. John M. Lee, Assistant U.S. Attorney, appeared on behalf of plaintiff; Bruce Hanley, Esquire, appeared on behalf of defendant Napieralski; Carol Grant, Esquire, appeared on behalf of defendant Borton; Scott Tilsen, Esquire, appeared on behalf of defendant Dale Mason; and Mark Peterson, Esquire, appeared on behalf of defendant Nancy Mason.

Based upon all the briefs and arguments of counsel and all the files and records herein, IT IS HEREBY ORDERED:

1. The government states it will disclose all evidence including impeaching evidence which is favorable to defendants. Defendant's motions for disclosure of such material is MOOT at this time.

2. The government will disclose all *Jencks Act* material including transcripts of grand jury testimony of any witness who testifies at trial. Production shall be made one working day before trial.

3. The government has made or will make all disclosures required by Rule 16, Fed.R.Cr.P. Defendant's motions for discovery are MOOT.

4. Defendant's motion for disclosure of a list of government witnesses is DENIED.

5. Defendant's motions to have government agents retain their rough notes is GRANTED unless they have already been destroyed.

6. Except for transcripts of grand jury testimony of witnesses who testify at trial, defendant's motions for disclosure of grand jury minutes and transcripts is DENIED. Defendant's have failed to make the requisite showing for disclosure.

7. Defendant's motions to participate in voir dire is DENIED.

8. Defendant's motions for disclosure of other crimes evidence is DENIED. Disclosures of such material is not required by rule or statute.

9. Defendant Napieralski's motions for severance is DENIED. The indictment alleges in Count I a conspiracy among all defendants to manufacture and distribute Sinsimella marijuana commencing about January 1, 1986, and continuing until the return of the indictment. Counts II through IV allege violations relating to the conspiracy occurring while the alleged conspiracy was in existence. Joinder under Rule 8(b), Fed.R.Cr.P. is proper. Defendant has failed to make the requisite showing for severance. Trial of this case will be neither extensive nor complicated; the jury will have no trouble compartmentalizing the evidence.

10. Defendant Borton's motion for severance is DENIED for the reasons set forth in paragraph 9.

11. Defendant Nancy Mason's motion for severance is DENIED for the reasons set forth in paragraph 9.

12. Defendant's motions for production of a small quantity of the alleged controlled substance for examination by their expert is GRANTED. The government and defendants shall agree on the method of transferring the sample to defendant's expert and draft an order for the court's signature.

13. Defendant's motions for the disclosure of informants is DENIED. The informants, if any, in this case appear to be tipsters. Alternatively, the defendants have failed to make the requisite showing for disclosure.

Dated: June 12, 1987

J. EARL CUDD
UNITED STATES MAGISTRATE

United States District Court
District of Minnesota
Fifth Division

Criminal No. 3-87-10(01)

UNITED STATES OF AMERICA,

Plaintiff,

v.

DENNIS NAPIERALSKI,

Defendant.

ORDER

Before the court are defendant's motions for discovery, disclosure, and inspection. John M. Lee, Assistant U.S. Attorney, appeared on behalf of plaintiff; Bruce Hanley, Esquire, appeared on behalf of defendant Napieralski; Carol Grant, Esquire, appeared on behalf of defendant Borton; Scott Tilsen, Esquire, appeared on behalf of defendant Dale Mason; and Mark Peterson, Esquire, appeared on behalf of defendant Nancy Mason.

Based upon all the briefs and arguments of counsel and all the files and records herein, IT IS HEREBY ORDERED that defendant's objections are overruled and the Magistrate's Report and Recommendation and Order are adopted and affirmed.

Dated: June 29, 1987.

ROBERT G. RENNER
United States District Judge

STATUTES, CONSTITUTIONAL AMENDMENTS, RULES

18 U.S.C. 841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

18 U.S.C. 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

U.S. CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONSTITUTION, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

FEDERAL RULE OF EVIDENCE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Q So some of you had to go back on the 12th to finish up processing evidence?

A That's correct.

Q Could you just tell us generally what you observed as you came down into the basement area?

A In walking down into the basement area, there was a flight of steps coming down, and off to the right when you are coming down the steps is what I believed marijuana plants growing in plastic jugs. There were growing lights that were in a running position. There were fans running off to the left coming down the steps. There was all kinds of plastic pipe, tanks.

Q Prior to coming to court this afternoon, did you look at what is purported to be a general diagram of the house in general area that you searched on the 11th and 12th of March?

A Yes, I did.

Q Did you find it to be not to scale but generally accurate in depicting the nature of things that you observed during the course of the search?

A That's correct.

Q I'm going to direct your attention to what has been marked for identification as Government Exhibit 1 and ask you if that is the diagram that you looked at and have just been asked about.

A Yes, it is.

MR. LEE: For purposes of illustration in aiding....

* * * *

A The basement area was warm. I don't recall the temperature.

Q Could you tell us what you would have observed about whether or not the lights were on, the lights you have described?

A Yes, the lights were on.

Q Could you tell us whether or not the nutrient pipe system was in operation or not in operation any time while you were there.

A I don't recall.

Q Do you recall whether the fans were in operation?

A The fans were in operation.

Q Could you tell us at the time you entered the house whether anyone other than Dale Mason was present?

A Yes.

Q Who? Who else?

A Dale Mason's wife was present, Nancy Mason, and one of their sons.

Q Do you observe Nancy Mason to be present in the courtroom?

MR. PETERSON: We will stipulate to the identification.

THE COURT: It's stipulated. How do you want to handle it?

MR. LEE: I would like the record to reflect that if the witness were to answer the question, he would say he does....

* * * *

... for identification as Exhibit 31 and ask you if you are able to recognize that.

A Yes.

Q Could you tell us how?

A This is a blue notebook which had come from the same file cabinet as Exhibit 30 came from.

Q Is it possible that it's a red notebook?

A Yes, this is a red notebook.

MR. LEE: We would offer Exhibits 30 and 31.

MR. HANLEY: May we approach the bench?

(Discussion at the bench.)

Mr. HANLEY: Both of these exhibits contain some reference to Dennis Napieralski, and I would take the position that they are inadmissible because of the inability to cross-examine and they're not co-conspirator statements made in the course of the conspiracy. I think that any references to Napieralski Forestry Products or my client should be eliminated from these documents. It's mostly notes and references to the business. And I would request that they be excluded.

MR. KURZMAN: I join in that objection on behalf of Mr. Borton, since there are notes which purport to have initials JB. And we would be unable to cross-examine. So I join in the motion on behalf of Mr. Borton.

MR. PETERSON: Your Honor, I frankly don't know what the exhibits contain, but I think they're notebooks which....

* * * *

A Yes, they are.

Q Are they labeled daytimers?

A Yes.

Q Do they purport to identify a particular individual and address?

A Two do and two don't.

Q Which two do?

A No. 32 does and 33 does.

Q What person is identified?

A Dale Mason.

Q At what address?

A 32 is Dale Mason, Spectrum Connection, PO. Box 27926, Denver, Colorado 80227.

Q And 33?

A 33 is Dale Mason, Napieralski Forestry, Route 3, Box 258, Wit Springs, Arkansas, and the phone number which consists of two phone numbers, 501-496-2354, and the other phone number being 218-245-3094.

Q Can you tell us where you first saw the exhibits?

A The exhibits were found in the master bedroom on the top floor of the house in a brown plastic box.

Q Did you observe other writings in that room in the nature of identification documents or personal documents identifying any individuals?

A Yes.

Q Who were the individuals?

A Dale Mason and Nancy Mason.

Q **MR. LEE:** We would offer Exhibits 32, 33, 34 and 35.

MR. PETERSON: Objection, Your Honor, as to the privilege previously stated.

MR. HANLEY: Your Honor, I would like to renew my objections on the grounds that were previously stated before this Court.

THE COURT: Very well.

MR. KURZMAN: I renew my objection and join Mr. Hanley.

MR. TILSEN: I object to 34 and 35 as to lack of foundation, lack of authenticity.

THE COURT: The objections will be overruled. 32 through 35 will be received

(Government Exhibits 32 thru 35 offered and received in evidence.)

BY MR. LEE:

Q Could you just tell us the periods covered by the four exhibits?

A Exhibit 32 covers the month of July 1986 through the month of August 1986. Exhibit 33 is the month of September through the month of October 1986. Exhibit 34 is the month of November 1986 through December 1986. And Exhibit 35 is January 1987....

* * * *

... of their business?

A I do not know

Q You would recognize that there are a number of uses for a bobcat in the tree-planting business?

A I don't know.

Q Relative to the generator, isn't it true that that was used in addition to the plant that was downstairs that contained the materials for growing the marijuana, that provided to the energy to the rest of the house, isn't that correct?

A That's correct.

Q And actually the generator provided electricity to make the house self-sufficient, is that correct?

A That's correct.

Q Now, in the course of your investigation and inventorying the products, you did not find any fingerprints of Dennis Napieralski in the downstairs area, did you?

A We did not look for any fingerprints.

Q So you didn't find any fingerprints?

A We did not find any fingerprints.

Q And you didn't find any fingerprints on the books and the other items, the containers?

A We did not look for any.

Q And relative to the diaries that were introduced, you did not conduct any handwriting samples or take any handwriting exemplars, did you?

* * * *

... make any overhead copies of any of the pages in the day-timers or notebooks in front of you?

A Yes, I did. I made several overheads.

Q Could you tell us how did you that?

A I utilized the photocopier in our office. On some occasions I magnified or blew up each daytimer page three times, and then it was put on transparency.

Q Did you find the transparencies to accurately reflect the original with the exception perhaps of size after you had finished?

A Exactly.

Q Have you brought to court with you those transparencies?

A Yes.

Q I'm going to hand you two items and ask you if you can identify them.

A These are two transparencies made from the day planners of Nancy Mason, January 1, 1987, January 5, 1987.

Q And do the transparencies reflect accurately the pages that they purport to be copies of?

A Yes, they do.

MR. PETERSON: Could you give the exhibit number?

BY MR. LEE:

Q What is the earliest date?

A January 1st, '87.

Q Would you be good enough to mark that 94 for....

* * * *

... to Chicago Hedwin Distributors, Wind Pack. There is another price, phone number and a Mary Ellen Kelly. There is also a package list. Talked with Sherrie in Denver with a phone number. Buckets and pails and jugs. This goes on for two more items.

Q Directing your attention to July the 26th, did you observe an entry in connection with the investigation on that page?

A Yes. It says arrived home — I believe it's 5:15 a.m. — with $87 cash. Slept three hours, unloaded trailer in the garage. Then it says, with the initials DN. Called okay, 4k, which is $4,000 over project. Reviewed plans.

Q Directing your attention to the 30th of July, did you observe an entry pertinent to the investigation?

A On this day, we drove through the Twin Cities. We stopped and weighed trailer above Cloquet, Minnesota. The trailer weighed 4,660 pounds. Next entry is arrived at Minnesota house. Okay. Very nice for us. Went to Cannon and got key, unloaded trailer and just piled boxes in the house.

Q Directing your attention to August the 1st, did you observe an entry for that date pertinent to the investigation?

A It says met Dennis. Went over service on his truck. Hooked up truck and trailer. Went over project figures. Questioned JB $7500. Then it talks about going down mountain, left Dennis at Dover Bank in Russelville, Arkansas.

Q Did you make an overhead of that page?

* * * *

Q In Exhibit 66, would you examine the exhibit to determine whether there is a photograph depicting the removal of tanks?

A Yes, there is.

Q Could you just briefly describe it?

A They're using the Case equipment. It has a large backhoe type. It's chained into the 800-gallon tank, and they're pulling it out of a hole that's filled with water. And there is a partial block foundation around it.

Q Directing your attention to the 10th of September 1986.

A Revised cost figures. Projected completion 100 percent. $100,000. Then it's an abbreviation for Dennis Napieralski. He called, not terribly shocked.

Q Did you make an overhead image of that?

A Yes, I did.

Q Would you put it on the screen?
Where were you when I interrupted you?

A Down to $100,000 Dennis Napieralski not terribly shocked.

Q Could you point on the overhead with your pen to show — well, maybe just on the edge of screen there.

(Witness complies.)

Q Did you observe anything else on there that you made note of?

A JB and I left Minneapolis, wrote new dollar sign idea, approximately 20,000 plan. Picked up control center tank for 50. JB and I can do our own plastic tank building, I believe it....

* * * *

... I can read the whole page. Mother and I went to Hibbing and got material and stuff. Perm for Dale and mother. Dale and Daddy went out to get lumber and welding stuff. Dennis picked up John at airport and they got home about 6 p.m.

Q September 18th, directing your attention back to 33.

A Nancy, Dennis and I went to Grand Rapids. I believe it's an abbreviation for bank. Picked up valves and something at Cole's.

Q Do you have an overhead for this as well?

A Yes, I do.

Q Could you show us where you were, and if there is anything else.

MR. HANLEY: Is that Exhibit 99?

MR. LEE: Yes.

THE WITNESS: Nancy, Dennis and I went to Grand Rapids Bank. And it goes on, to pick up valves and housing at Cole's I believe. JB and daddy built form. Finalized order for generator set. Nine four two seven. Started burning wire for motor. Move motor. Then at the end, Dennis, JB and I talked plans of percentage. JB, ten percent. And there is an initial. It's hard to read. Expect no percent. At the bottom 50-50 percent, Dennis Napieralski, and that I believe is an abbreviation initials for Dale Mason. Then at the bottom there is a $6,000 check cashed. Generator set ordered.

THE COURT: We will recess at this time until....

* * * *

(G. HOPPS — DIRECT)

Q Do you recall approximately when the first call came in?

A It was approximately 10:42 or around there, a.m.

Q Do you recall did the caller identify himself in any way by name during the course of the call?

A Yes, sir, he did.

Q What did he say?

A He said his name was Dennis.

Q Did you receive another call from that individual while you were there?

A Yes, sir, I did.

Q When was the second call?

A That was approximately 1:27 in the afternoon.

Q Did you record that call?

A Yes, sir, I did.

Q Did you listen to the recording?

A Yes.

Q Was it accurate?

A Yes, sir.

Q Have you seen a transcription, a written transcription, of that call?

A Yes, sir, I did.

Q And was it accurate?

A Yes, sir, it was.

Q Could you tell us, directing your attention back to the first call at about 10:40, there were a few seconds that were....

* * * *

... other individual as well?

A Yes, sir.

MR. LEE: We would offer what have been marked for identification as Exhibits 49-A and 49-B.

MR. HANLEY: I renew my objection that was presented to the Court in motions here.

THE COURT: Anyone else?

MR. KURZMAN: No objection.

THE COURT: I take it by your silence, there is no objection as to the other two remaining defendants?

MR. PETERSON: Correct, Your Honor.

MR. TILSEN: Correct, Your Honor.

THE COURT: Very well. The objection will be overruled. Exhibits 49-A and 49-B will be received.

Government Exhibits 49-A and 49-B offered and received in evidence.)

BY MR. LEE:

Q Agent Hopps, I am going to direct your attention to what have been marked for identification as Exhibits 50 and 51. Are you able to recognize those items?

A Yes, sir, I am.

Q Do they appear to be transcripts?

A Yes, sir, they are.

Q Do they appear to relate to the telephone calls that you received from Dennis?

* * * *

... out of Minneapolis. Not scheduled to return in next few months. The rest is pretty general.

Q Would you return to the witness seat?
In the same Exhibit 34, directing your attention to December 20th.

A Cleaned up from building, bed and threading system. Put rails down, set two more dollies on them. Cutting pipe for more dollies. Ready for Nancy and Kent to drill and tap, 42 F 19 inches. Added vegetable nutrient. Cutting metal for dollies.

Q Directing your attention to Exhibit 36, Nancy Mason, on December 22nd, was there an entry pertinent to the investigation?

A December 22nd, got a check from Dennis. Went to town and cashed and sent $1400 to John. And I got water and groceries. And that was about it.

Q In Exhibit 34, on December 25th?

A I sprayed part 1400 — I can't read that last word. JB called. Cutting more pieces of metal for dollies. Added water to 400 gallon. Added quarter floral nitrate to hundred gallon. 42 F showing foliage damage. Temperature too high. Dennis Napieralski called and some foliage damage on 95 check.

Q Do you have an enlargement for December 30th from Exhibit 34, Dale Mason?

A Yes, I do.

A Dennis Napieralski called. Making shopping list, welding dollies. Nancy and kids working on pipe. Finished six more dollies. Dennis questions deals. I questioned his activity.

Q On December 31st for Exhibit 34, Dale?

A December 3, putting lights together. Kent having terrible time trying not to work. JB called, no check in mail yet.

Q Directing your attention to, I believe, Exhibit 37, Nancy Mason on January 1?

A 37, yes, sir.

January 1, 1987? Kent and Eric worked on pipes. Dale got lights set up, got jugs and rocks in, and I vacuumed Dennis's car.

Q Directing your attention to Dale's for January 2nd, is that Exhibit 35?

A Yes, it is.

Q Left 6:30, going to Minneapolis. Picked Dennis Napieralski up at airport. Bought 19 inch, proton monitor and two small fans at Granger.

Q Do you have overheads for January 3, 4, 7, and 9 from Exhibit 35, Dale Mason?

A Yes, I do.

Q Would you please show those?

A Dennis went to breakfast meeting with BPC, initials.

MR. HANLEY: Your Honor, again I ask that the witness read what is written.

THE COURT: It's a legitimate request.

THE WITNESS: Den went to breakfast meeting, initials BPC, cutting and washing pipe for a dolly hookup. Connected all 12 dollies up. Nancy and Den moved containers onto dollies. I can't read the second word, in control center. It's hard to read the last part.

BY MR. LEE:

Q Could you go to January 4, 1987?

A Hooked up glass lights. One bad balast. Nan and Den preparing containers.

Q What were the two names?

MR. HANLEY: Objection; already asked and answered.

THE COURT: Overruled.

BY MR. LEE:

Q What are the actual letters?

A N-a-n and Den, D-e-n.

Q So they're abbreviated?

A That's correct.

Q What's the rest of the line?

A I changed out fuel mixture. Getting daddy to wash more medium. Den left. Nancy and I went to north home and Dr. Franklin — can't read the last — Marcia, I believe.

Q Directing your attention to January 7th.

A January 7th. Alternating lines nine on nine off. Two or three hour cycles. Den did pruning. JB called, skiing in Aspen. Got approximately 60 new slip adapters from byproduct of pruning.

Q January 9th.

A January 9th. Straightened up lower deck. Hooked up water line to humidifier. Getting ready to work in garage. Eating lunch. Power company came. Upgrade transformer. And then it's 15 kva. Left for Duluth. Northern Electric Supply picked up switch. And Den, Nancy and kids and I went to movie, Crocodile Dundee, and Den drove home. Den's understanding of JB's ten equals cost first.

Q Would you resume the witness stand, please?
Again, Exhibit 35, January 10th.

A January 10th. Discussed dollar sign return and percent split. Approximately 100,000 to operation black. 80 percent in the project until in black, 20 percent to split. Then I put up insulation in garage around generator set.

Q Directing your attention to 37, January 21st. Is that Nancy Mason?

A Nancy Masons's daytimer is January 21st. Had another chiro adjustment. Dennis got in late.

Q Is that D-e-n, or is that some other combination of letters?

A It's Dennis, D-e-n-n-i-s.

Q Directing your attention to the 24th in Exhibit 37.

A Guys got lots done.

Q Directing your attention back to the 26th of January in Exhibit 35.

A 25th?

Q 25th.

A Den washed medium. Cleaning threads out, major job on cutting steel for more dollies. Made template for drilling. I put 30 new slip nozzles in. Then it's hard to read. Picked up more supplies at L&M, went four-wheeler riding, cut more steel.

Q Directing your attention to the 26th of January.

A Slip adapters off one FMA, weld legs together for eight dollies. Den drilled for wheels. Brought rest of bagged medium in, another box of jugs, one left. Added five pounds and ten cups to fuel mixture. Put tracks on bobcat. Decided to order fuel, 600 gallons, 74 cents delivered Thursday, four four four. Finished two dollies. Nancy and kids — can't read the last part.

Q January 27th, do you have an overhead?

A Yes, I do.

Q Is this from Exhibit 35, Dale?

A Yes, it is. January 27th. Called JB home. Den stopped truck off edge of driveway. Den went to call JB. Den went to get diesel. Den and I talked about JB's percent, project X. Put more nozzles in. I can't read the last part.

Q Would you resume the witness stand?
Would you direct your attention to Exhibit 37, Nancy.

* * * *

(J. MURPHY — CROSS)

Q It's clear that that wasn't marijuana, isn't it?

A No. I believe this to be his satellite equipment in Colorado.

Q So Dale Mason, or whoever was selling something, must have sent out some sort of package through that?

A I believe it was some stuff he left behind in Colorado.

Q Now, on October 27th — let me go back. On October 16th, 1986, that is when the garage started going up, correct, started building the garage walls?

A Yes. It says started building garage walls.

Q On October 27th, there is a reference to — would you read at the very top on October 27th?

A Den Nap called, lost contract. Looks like it says no home run. Then there is EX.

Q Now, go back to the 3rd of October, which I skipped over by mistake. Isn't there a reference to a contract, at 10:00?

A Den Nap called, got contract, 90 percent.

Q That would be a tree planting contract.

MR. LEE: I'd object; calls for speculation.

THE COURT: Overruled. You may answer if you can.

THE WITNESS: I'm not sure, sir. It could be.

BY MR. HANLEY:

Q That was Dennis Napieralski's business, is that correct?

A I couldn't be sure.

Q But he thought enough of the contract, and Dale Mason was concerned enough about that contract that on the 27th, he noted that the contract was lost, correct?

A I couldn't tell if it's the same contract. It does say contract.

Q Now on November 2nd, 1986, is there a reference to at 11:00 — could you read that, please?

A November 2nd. Called mother, no money. There is a dollar sign.

Q Looks like at that time Dale Mason had no money.

A It says called mother, no money.

Q On November 19th there is a reference to babies ready now.

A Yes.

Q And there is a discussion of a LA contact, is that correct, Jeffrey Hutchinson, written rather prominently on there?

A You are talking right above that?

Q Right.

A There is two things with LA. There is an LA contact, Jeffrey Hutchinson. Worked at tar center. Then down below made connections with Dennis, JB. JB called back. LA fell through.

Q Now again, when you read, you don't read things exactly as they appear, do you, Agent?

A Well, it's Den, not Dennis, and initials JB.

Q And that Den could mean anything from Denise to Dennis, correct?

A No.

Q That's your opinion?

A I cross-referenced several of these daytimers with Nancy's and most times Dennis is Den.

Q But that's your interpretation of this, correct?

A Through several hours of studying them, yes.

Q Now, there is no indication after September that Dennis Napieralski is up at the property until January, is that correct?

A Again, sir, I would have to check through to make sure.

Q On February 1st, 1987, there is a reference to — what does that say there at 9:00?

A Den called. He didn't listen to what I said.

Q And it's true that through your review of these documents and these daytimers, that except for the call on February 1st, 1987, there were no calls from Dennis Napieralski to the premises until the March 11th calls?

A I don't recall for sure. I would have to check.

Q But would you accept the premise that a review of these documents from February 1st on, the daytimers, through March 11th, both for Nancy and Dale, would show that there were no more phone calls from Napieralski to them?

A I'll look through here quick if you like. There don't appear to be any more in February. I don't see any in March.

* * * *

A Yes. He visited by my office later after I had been out to the property, I would say a week or ten days later. He stopped to visit me about the homestead situation, because I had told Mr. Mason that he would not qualify.

Q Was that the first time you had ever met Mr. Napieralski?

A Yes, it was.

Q Did you have some discussion there at your office with him?

A Yes.

Q Could you tell us the substance of that discussoin?

A I briefly explained that since he wasn't living in the property on January 2nd, which is the assessment date, that he would not then qualify for the Minnesota homestead exemption. We had a good conversation, and I think he understood what I told him, and basically that was about all there was to it. He had asked for a tax estimate based on the rental class, which it was going to be then for the next year, and we did mail that to him.

Q Do you remember him making any statement about who was occupying the property?

A Yes. He stated that Dale Mason was occupying the property.

Q Do you recall him saying anything about Dale Mason's relationship to him or his business, if any?

A He said he was a business partner and he was working for him.

Q Dale Mason was a business partner?

A I believe he mentioned that he may, yes.

Q You indicated that if he did sell the property to Dale Mason, that Dale Mason would qualify for the homestead?

A Right.

Q And that would have been some time towards the end of January of 1987.

A Yes.

Q Your records don't reflect the date or anything like that?

A I have the date that I was on the property. I don't have the date that Mr. Napieralski visited my office.

Q Mr. Napieralski was cooperative with you and didn't get into any kind of argument?

A Yes, he was cooperative.

MR. HANLEY: Nothing further.

(L. DAIGLE) CROSS-EXAMINATION

BY MR. KURZMAN:

Q Sir, my name is Marc Kurzman. I represent a man named John Borton. Do I understand you correctly that you were inside the garage-like structure near the end of January of '87?

A Right.

Q Did you report any suspicious spells or activity to any law enforcement officers?

A No, I did not.

MR. KURZMAN: Thank you. Nothing further.

MR. TILSEN: No questions.

* * * *

GENE GRELL,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Mr. Grell, could you tell us where you reside?

A Grand Rapids, Minnesota.

Q By whom you are employed?

A Blandin Paper Company.

Q Could you tell us a little bit about their business at Grand Rapids?

A Blandin Paper Company makes a publication grade coated paper. And I work in the forestry part of it.

Q Are you one of a couple thousand employees that work for Blandin in the area?

A Approximately 1500 employees.

Q What's the nature of the work that you have been doing for Blandin the last couple years?

A My job is primarily silva culture. That's reforestation, site preparation, conifer plantation maintenance, things of that nature.

Q Does Blandin cut down trees to make this paper that you were telling us about?

A Yes.

Q You have to oversee the trees getting replanted?

A Yes.

Q In connection with those duties, did you become acquainted with an individual by the name of Dennis Napieralski?

A Yes.

Q Could you tell us has Mr. Napieralski and his company done some replanting for Blandin in the recent years?

A Yes, they have. Since 1980, we have used his crew every year.

Q Would you know approximately how much Blandin would have paid Mr. Napieralski to do that replanting on the average for those years?

A Yes, approximately nine to $10,000 a year. That's averaged out over those years.

Q That's 1980 through —

A 1987.

Q Could you tell us what was it that Mr. Napieralski's company actually did to earn that nine or $10,000 each of those years?

A They planted bare root seedlings, conifer seedlings and containerized seedlings.

Q In a given year, how many would they plant to earn that amount of money?

A It varied from year to year, but on the average, I would estimate probably 300 to 350 acres.

Q And on a given year, what would be typical to put on an acre?

A Approximately 800 seedlings per acre.

Q So would it be fair to say that Mr. Napieralski's company would plant something in the neighborhood of 300,000 of these small seedlings for Blandin on a given year?

A That's correct.

Q How would Mr. Napieralski's company physically accomplish that?

A By hand planting, using primarily what's called a hoe cad.

Q Have you ever seen his employees doing this?

A Yes.

Q Could you just describe typically what an employee does to the plant?

A First of all, they have planting bags. It's usually a bag with a belt and shoulder straps. They come to the central area where I deliver the seedlings. At that point they take the seedlings from the carrying bags and put them into their planting bags. And then they just go into the field and start planting.

Q How many employees would typically be working for Mr. Napieralski when this was accomplished?

A I'd estimate ten to 15.

Q How long would it typically take his company to accomplish this planting in a given year?

A Ten to 14 days.

Q Ten to 14 days?

A Yes.

Q And that they may involve ten to 15 people for that time period?

A Yes.

Q Did Mr. Napieralski ever supply the seedlings?

A No.

Q What did he supply other than the ten to 15 workers?

A Just the workers and their tools.

Q And he would supply ten to 15 workers for a couple of weeks a year and Blandin would pay him something in the neighborhood of nine to $10,000?

A That's correct.

Q It was up to him out of that money to pay for his help?

A Yes.

Q Now, is there a typical time of the year that Blandin would want this planting done?

A Definitely. It's shortly after break up, which means shortly after the thawing period when the ground is still cool.

Q Would that typically be in May?

A Yes.

Q So Blandin's connection with Mr. Napieralski, as far as him doing something for you, would normally be a two-week period in May?

A That's correct.

Q Did you know that Dennis was buying property near Ken's?

A Yes. He told me he had bought a place up there.

Q Did he tell you that Dale Mason was living there?

A No.

Q You discussed his business, I expect, many times?

A As far as tree planting?

A Oh, yes.

Q Did he discuss with you that he at times planted over a million trees a year?

A Yes.

Q You were aware of that fact?

A Yes.

Q Did he tell you that he does all of the selling and the marketing of Napieralski Forestry Company and has the crews go and plant the trees?

MR. LEE: Object; relevance, beyond the scope.

THE COURT: Give me the question, Bob.

(The record was read.)

MR. LEE: Your Honor, I'd also object as hearsay, self-serving.

THE COURT: Overruled. You may answer.

THE WITNESS: I don't know if Dennis ever came out and told me that he markets this whole business on his own. However that is something I probably assumed to be the case.

BY MR. HANLEY:

Q And he was not, as a rule, present for all of the planting, is that correct?

A That's correct.

Q And he would generally have a foreperson who he could rely on to do the planting?

A Yes.

Q Now are you familiar with killer tree flagging?

A Yes.

Q What does that mean?

A Well, that's a plastic sort of flagging, marking, flagging, that is made for primarily loggers. When they run into dangerous trees in the woods, they go so many feet from the tree and hang this flagging in a circle around the tree to warn other wood workers that there is a danger.

Q Are you familiar with the tree flagging that Napieralski Forestry Company used?

A I think so.

Q Have you seen the Napieralski crews using the tree flagging?

A Yes.

Q What's the purpose of the flagging as used by highway contractors, road contractors or anything?

A Essentially, it's a marking device.

Q To determine what?

A Well, in the case of Dennis's crew, it was to mark specific turns in the rural areas so his crews could find the planting sites.

Q Now, you have been with Dennis Napieralski on social occasions, is that correct?

A Yes.

Q Have you ever seen him consume alcohol or use any narcotics?

MR. LEE: I'd object.

THE COURT: Sustained.

BY MR. HANLEY:

Q Mr. Grell, are you familiar with Dennis Napieralski's reputation for truthfulness in the community in which you know him.

MR. LEE: Object, relevance.

THE COURT: At this stage, it seems to me it's irrelevant.

MR. HANLEY: All right. Perhaps I can bring that up later. No further questions.

(G. GRELL) CROSS-EXAMINATION

BY MR. KURZMAN:

Q Good afternoon, Mr. Grell. My name is Marc Kurzman. I represent a man named John R. Borton. Did you ever meet someone named John Borton or John R. Borton?

A No.

Q You work for Blandin in the reforestation program?

* * * *

(P. GOULD — DIRECT)

A Yes.

Q How large a staff?

A We have two brokers and six agents.

Q Directing your attention to May of 1986, did Realty World have a listing at that time of a property owned by the Michaels on Lower Balsam Lake?

A Yes.

Q That's in Itasca County?

A Yes, it is.

Q You'd had the listing for sometime, if you know?

A Yes.

Q In May of 1986, did you have occasion to talk to a prospective purchaser for the Michaels property?

A Yes, I did.

Q Do you remember where you first talked to the prospective purchaser?

A In the office.

Q Was that person somebody you knew before?

A No.

Q Could you describe whatever contact you had with the prospective purchaser at that time, the first meeting?

A Yes, sir. I was on my way out of the office, and a person came in and asked if we had a property listed, describing that property that you had just mentioned. And I said yes, we did. They asked if I would show them the property. I had another previous appointment. I said I could not show it at that time.

Q So he would have liked to have seen the property right then and there?

A Yes.

Q He did ask about the specific property, the Michaels property?

A Yes, sir.

Q Did that prospective customer ultimately buy the property?

A Yes.

Q And so who was the customer?

A Mr. Napieralski.

Q Dennis?

A Yes, sir.

Q How far would the property have been from the real estate office?

A Approximately between 23 and 28 miles, about that.

Q Did Mr. Napieralski explain what caused his interest in the property or how he was acquainted with it or anything that you recall?

A In the initial contact? No. sir.

Q Was your contact with him relatively brief as you've described it initially?

A Yes. I had an appointment, and I was on my way out and I explained that. I gave a little spec sheet that we have on the property, and asked if he would see it at a different time. He explained no, that he had another appointment. He was leaving. And I apologized said this is the information. If you want any more, contact me later.

Q Did you hear from him again at some point?

A Yes that evening.

Q What time?

A Pardon me?

Q When that evening?

A I believe that telephone call came through about between ten and 11:00 that evening. I got a telephone call at home, and it was Mr. Napieralski and he told me he was in Wisconsin and he could not get the property out of his mind, and asked me some more questions about the property.

Q Did you have some discussion about his interest in buying the property?

A Yes. He asked me what I thought the sellers would take for the property.

Q Did you discuss him making a bid at some point?

A He asked if they would be interested in taking it like with nothing down and if it was going to be cash what did I think that they would take.

Q So you discussed possible terms of a purchase?

A Yes.

Q Where did the negotiations or discussions go from there?

A I believe that after that time he just — I said I would send him some more information on the property. He said he was leaving to go to Maryland, and that he would contact me later.

Q At some point did he ask you to submit an offer on the property to the seller?

A Yes, he did, contingent on his brother seeing the property.

Q Did you discuss with him arrangements for either Dennis or his brother to see the property?

A Yes. I was to contact his brother through another party and make an appointment to show the house at 4:00 in the afternoon in May. His brother, Kenny, arrived early, and the seller, who was mowing the grass, actually showed the property to him. Then I just got a call saying go ahead. Kenny said it was all right.

Q You got a call from who?

A Dennis.

Q It was all right to do what?

A To go ahead with the sale and send the purchase agreement.

Q Was that the first purchase agreement?

A That was the first purchase agreement.

Q So would you have sent that to the seller?

A Pardon me?

Q Do you send the purchase agreement to the seller?

A No.

Q Who did you send it to?

A The buyer originates the purchase agreement normally. So I sent that one out. That one got lost in the mail. I sent another one out then later on.

Q At some point was the offer made by Mr. Napieralski accepted by the seller?

A Yes, it was.

Q Do you have any memory of approximately when that would have been?

A I believe that was towards the end of May, because I had two offers of the property at the same time. One was for a contract for deed and Dennis's was for cash.

Q Were you involved in arranging for the closing on the property?

A Yes, sir, I was.

Q And could you tell us how it is you became involved in arranging for the closing? Who asked you to do that?

A After a few phone calls and asking if I would please try to get this thing closed, Dennis contacted me on, I believe it was around the 20th, said he was coming up and that he would like to view the property at that time. Previous to that he had not seen the property.

Q The 20th of what month?

A June.

Q June?

A July, I'm sorry. July, because the second purchase agreement went out on June 23rd, and it was in July. I believe....

* * * *

A Well, he explained to me that he did reforestation in our area and that he would like to have a base. And he also explained to me that he wasn't going to live there full time and that he was going to be renting it out.

Q At the closing do you recall any discussion about plans to change or improve?

A He asked me where I thought a garage would be. And we discussed like where the well was and where the septic was. He talked to Mr. Michaels at the day of closing about those particulars also.

Q Did he ever talk to you about a homestead application for the property?

A Yes, he did. I explained to them that —

Q Before you tell us about that, when did you talk to Mr. Napieralski about a homestead application?

A Prior to closing.

Q On the day of?

A No, on the way back from dealing the property.

Q Do you recall the substance of conversaion?

A He said could I get homestead? I said no, you can't, because you are not going to be residing on it if you are going to be renting the property out.

Q Did you ever discuss a homestead application with him after that that you recall?

A I told him if he wanted to file a homestead application, that was his business. But I would not make that part of my closing.

Q Do you customarily?

A Yes, I do. That's part of what I normally do.

Q Although you customarily do, on this occasion did you file a homestead application?

A No, sir, I did not.

Q I'm going to direct your attention to what's in evidence as Exhibit 123. Is part of that in typing?

A Yes, it is.

Q And is part of it in printing?

A Part of it is written.

Q Written. Do you recognize the written portions?

A It looks similar to some of the other notes I had received.

Q Is it in your writing?

A No, it is not.

Q So you didn't fill it in?

A No, I did not.

Q Is it signed by the applicant? Is there a signature on it?

A Yes, it is. It is signed by, I believe, Dennis Napieralski, if you can make that out. It looks similar to other notes that I have received.

Q The day that you took Mr. Napieralski to view the property, do you recall how you got there?

A Yes. He allowed me to drive his car.

Q Did he tell you anything about the car?

A It was brand new. It was an Audi 5000.

Q Did you enjoy driving the car?

A Yes, I did. I had never driven an Audi 5000 before.

MR. LEE: I have no further questions

(P. GOULD) CROSS-EXAMINATION

BY MR. HANLEY:

Q Good afternoon, Ms. Gould.

A Good afternoon.

Q My name is Bruce Hanley.

Miss Gould, the property at Lower Balsam Lake that we have discussed was first put on the market in September of '85, is that correct?

A No, it was not. It was previously listed with another real estate company.

Q So it had been on the market even longer than September of '85?

A Yes.

Q How long?

A It had been on the market for a year.

Q So by the time you got it, it had already been listed for a year and then you were able to sell it in June of '86?

A July of '86.

Q But you got a purchase agreement in June?

A Yes, I did.

Q And the original price was 64 nine?

A Yes, sir, it was, when it was listed with me. Originally when it was first put on the market, it was at 69 nine.

Q And then it was reduced to 64 nine originally with you, and further reduced to 59 nine?

A Yes, sir, it was.

Q And showing you Defendant's Exhibit No. 2, do you recognize that?

A Yes. This is a copy of the flyer that I gave to Dennis.

Q And with some attachments. What do those show?

A The last one is a plat drawing of that township. And this is part of a survey map that Mr. Michaels had that I used.

Q Now, Defendant's Exhibit 2, Defendant Napieralski Exhibit 2 are documents that were copies of documents that you sent to Deputy Medure, is that correct?

A Yes.

Q And these were maintained in the normal course of your business in your file, weren't they?

A Yes, I have the originals right here.

MR. HANLEY: Offer Defendant Napieralski Exhibit 2, Your Honor.

MR. LEE: We have no objection.

THE COURT: Received.

(Defendant Napieralski Exhibit 2 offered and received in evidence.)

BY MR. HANLEY:

Q So what we have here is we have 1300 feet of lakeshore, 31-acre tract, with a three bedroom home, with a free-standing wood stove, according to this, correct?

A Yes.

Q Now, if Mr. Napieralski could have bought that property for 40,000, that would have been a heck of a deal, isn't that correct?

A Yes, sir, it would have.

Q At 46, it was a heck of a deal, wasn't it?

A It certainly was.

Q Those types of deals don't come up that often, do they, in that part of the state?

A Occasionlly, yes, they do, depending on the circumstances of the seller.

Q You have to be in the right place at the right time, is that correct?

A That's right.

Q Now, I believe that you testified earlier that Ken Napieralski did in fact see the property sometime in May, is that correct?

A Yes, he did.

Q And that was when Mr. Michaels showed him around, correct?

A Yes.

* * * *

A He was pushing me. I felt the pressure.

Q Sometime in there you took a three-week vacation in the early part of July and kind of delayed things a bit?

A No. I don't delay any of my cases. That case was turned over to my broker. And my broker was calling the bank and had made contacts with the bank, asking if they had received things and how everything was going.

Q I wouldn't mean to suggest that you delayed anything. But did you take a vacation in there at some point in time?

A Yes. We do take vacations.

Q You have to take vacations. That's understandable.

Now, Mr. Napieralski did discuss with you the fact that he wanted to put a garage on property, is that correct?

A Yes, sir.

Q And didn't he also talk about other changes, structural changes that might be made to the house?

A Just that he was going to build a garage to house some of the equipment that he would be using.

Q Did he also talk about making windows larger in the master bedroom so that he can view the lake, making some changes in the master bedroom?

A Yes.

Q Those were some long-range plans that you can't do overnight, correct?

A I don't know. I mean, I have seen people take windows out....

* * * *

(J. MARTIN — DIRECT)

... August?

A For August?

Q Yes sir.

A For August he reported 950 kilowatt hours.

Q And what did he calculate he owed you for that?

A $104.57, including tax.

Q Is it indicated that he paid you that?

A He paid, and this is marked that he paid in cash.

Q Would you move to September? What did he calculate his kilowatt hours were?

A In September, he reported 270 kilowatt hours.

Q Did he pay you for those?

A Yes, he did. Again, it appears he paid in cash.

Q How much?

A 2621.

Q What about October?

A Pardon me?

Q What did he report for October of 1986?

A 1750 kilowatts.

Q With tax what did that come?

A 157.09.

Q Did he pay it, and if so how?

A Yes. It appears he paid in cash again. The ticket's marked cash.

Q How about November 1986?

A November he reported 2380 kilowats, a charge of 206.44. And he paid in cash.

Q December 1986.

A December he reported 4310 kilowatts, for a total charge of 357.90, and paid in cash.

Q Do you know from your records whether he's got electric heat?

A Our records indicate that he does not have or did not have electric heat.

Q What did he report his usage to be in January?

A In January he reported 7400 kilowatts, for a total charge, including tax, of $600.28, and he paid in cash.

Q What was the usage in February?

A February was 4090, total charge of $340.68. And he paid in cash.

MR. LEE: I would have no further questions of the witness.

MR. HANLEY: No questions.

MR. KURZMAN: No questions.

MR. TILSEN: No questions.

MR. PETERSON: No questions.

THE COURT: You may step down.

MR. LEE: Your Honor, the government would rest.

THE COURT: The record will reflect the government has rested. We will take our recess then at this time, members of the jury, until tomorrow morning at 8:30.

Now, I am going to tell you that it's possible — I can't be held responsible, but it's possible that we shall be finishing the case tomorrow. If we do, fine; if we don't, fine. But if we do, I want you to know that it's not the Court's intention that you be sequestered, so you don't have to worry about bringing your night bags with you. You will, however, bear in mind that it might well be that your day will be long indeed and extend into the night hours. So if you have transportation problems, I would suggest to you that you take care of them this evening or before you come in tomorrow morning at 8:30.

I will see counsel then in chambers in five minutes.

(In chambers.)

THE COURT: Who's going to put a case in?

MR. HANLEY: I'm going to have two.

THE COURT: What's your best estimate as to the length?

MR. HANLEY: I'm going to introduce the testimony — I seek to introduce the testimony of Larry Hutchinson, the professor at the university, the linguistics expert. And I am basically going to have him testify about the fact that the actual transcript of the tape recordings of the phone calls on March 11th — the first one is the longer one — that the transcripts were not accurate. And that even though....

* * * *

(J. ZALABAK — DIRECT)

Q Have you ever worked with him?

A Yes.

Q Approximately how many times have you worked with him?

A I'd say about three times.

Q In what capacity have you worked with him? What were your duties?

A I was a worker just like any hired help.

Q So he hired you?

A Yes, right.

Q In what states did you work for him?

A Pennsylvania, Wisconsin, and Minnesota.

Q Were you ever a subcontractor for him?

A Yes, I did one job for him in Wisconsin.

Q When was that?

A That was last spring.

Q And you say you did a job for him. How did that work?

A You mean — what do you mean by that?

Q What was his role and what was your role on the job?

A He assigned me to a job and I just completed it, just like my own job.

Q Was he present for the job?

A No, he wasn't. He showed up at one time just to see how things were going.

Q Essentially you planted trees?

A Yes. I had help and watched over the planting.

Q Did you have your own crew?

A That's right.

Q Was it your crew?

A No. I used part of Dennis's crew. Actually it was a small crew. It was like four people involved.

Q Are you familiar with where Dennis Napieralski or Napieralski Forestry Company has jobs?

A Not really. I have an idea where he works mostly out of. Is that what you wanted?

Q Do you know where he works mostly out of?

A Pennsylvania. He does a lot of work around there.

Q And you have a business relationship with Mr. Napieralski?

A Yes, if I asked counseling, asked what he does. But as far as business, we don't work together. I am separate and he is separate.

Q Now, on any job that you have worked with Mr. Napieralski, has he ever given you a credit card?

A Yes.

Q Could you explain to the Court and jury the circumstances under which that was given?

A He gave me the credit card for trips I did for him. And he said I could use the credit card for getting gas and expenses on the trip.

Q When was that?

A That was last spring, too. That was in Pennsylvania.

* * * *

(P. MEDURE — REDIRECT)

... State Police.

Q What did the teletype report?

A As I recall it, it stated in the teletype that the process of an underground greenhouse was being built. I believe it was 30 by 60 and it had given me two names, Dale Mason, a John Borton and a telephone number on a Coleraine exchange.

Q The Borton name was John Borton.

A That is correct.

Q Now, on September 7th, did you do some follow-up on that teletype?

A Yes, I did.

Q Did you talk with state police in Indiana?

A I talked with an individual that sent the teletype from the Indiana State Police.

Q Did you talk to him twice?

A Yes, I did.

Q And, the first occasion, did you call him?

A Yes, I did.

Q Did he tell you they received information about the suspected operation in Minnesota from an informant?

A Yes, he did.

Q Did he tell you that the informant said her brother was invoived?

A As I recall the conversation, yes.

Q So we have a sister talking about her brother?

* * * *

... description by several witnesses. But we also have, not in the form of photographs, but in the form of daytimers, a history, a day-to-day history of what led up to March the 11th. And you heard the testimony. And you will have these histories with you in your jury deliberation room. And I believe you have been told that two people, two of the defendants in this case, actually reported a day-to-day history of what led up to March the 11th. And you will have their histories with you to examine day by day, to compare what Nancy said about a day to what Dale said about a day and to see what Nancy said about Dennis and what Dale said about Den or Dennis, what Nancy said about John, what Dale said about JB.

You've heard the testimony from Agent Murphy that it's common for people involved in the matters that he investigates to

use some abbreviations, to use code. I think that if you go through all of these histories, if you go through the notebooks, if you go through the writings, I'm not certain but I think that if you go through every page and every word, you are not going to find the word marijuana. You probably won't find the word sensimella. Does that mean there was no sensimella marijuana found on March the 11? I think your common sense will tell you that people aren't going to write down marijuana. They're not going to be that obvious. They're going to use some code. They're going to use some shorthand. So when you find things in code or in shorthand here, you can use your common sense. And you can conclude that it would be logical for someone involved in an illegal business perhaps to use some shorthand. As I say, I don't think you are going to find marijuana written down.

I would like to summarize some of the things that the histories record, these histories. We heard testimony, you saw and overhead concerning August the 1st. Now, we heard evidence. We heard the realtor testify yesterday about Mr. Napieralski being interested in this property that was searched on March the 11th. He was interested in May of 1986, came up in July. They closed on the 25th of July. He bought that property. He said he wasn't going to live in it right away. He was going to have a tenant. And he said he was going to build a garage. Both Patty Gould, the realtor, and Mary Michaels, who was at the closing, remembered and testified that Mr. Napieralski announced at the closing he had plans to build on the property. And he was in a hurry.

Mr. Napieralski wants to get things done. He was in a hurry to close. He was in a hurry to get the Michaels' things out of that house. They closed on Friday. He wanted in there by Monday. The Michaels got out of there in two days. Moved over the weekend.

Now, within a week, the daytimer shows that Dale Mason is meeting with Dennis Napieralski, and he is borrowing Napieralski's truck and trailer for him in Arkansas. And Dale Mason's history indicates that on August the 1st, shortly after closing, he met with Dennis and went over the project figures with Dennis. And I'm going to paraphrase, because I obviously haven't memorized all the words in this book. So when I paraphrase,

remember I'm paraphrasing. You look at the book to see what the actual words are, to see what the abbreviations are. But my memory is that the book says that there were questions about $7500 for John Borton. That question came up when Dennis and Dale Mason met on August the 1st, question about $7500 for John Borton.

Now then, if you go to August the 5th in Dale's history, there is an entry that he and John are finishing up loose end in Salinas, California. There is an entry that they bought 170 wheels. We have wheels in evidence. We ahve a big box of wheels from John Borton, Salinas, California, this kind of box, containing this kind of wheels. This kind of wheels are found on the marijuana.

On August the 5th, Dale Mason is talking about meeting with John Borton and buying 170 wheels for $292 in Salinas, California. There is an entry about buying almost a thousand dollars' worth of nutrients in Salinas on the 5th. Another entry, another date in the history is August the 11th. Dale records that they unloaded the geolite from the 800-gallon tank into the tarp. You saw Exhibit 66. They unloaded the geolite out of the 800-gallon tank into the blue tarp.

Find the facts. You find whether these pictures, or some of them, were taken on or about August 11, 1986.

The history goes on and reports that on August the 15th, John Borton was running the excavator and cut the power lines. Dennis called that day. Dale called about the building permits. August the 19th, John Borton and Dennis argued about where to run the septic lines. John Borton dug around the tank. August 24th, John Borton ran the bobcat. Dennis called regarding time to return on money. How soon am I going to make a profit?

Dale notes that he outlines the room layout. That's after Dennis asked about how soon are we going to make a profit? Dale told him about how they're going to configure this room. August 27th, John Borton done is digging. Dennis called. Dennis is a control person. Dennis wants to know what's going on. Dennis wants to know when are were going to get around the profit corner. Dennis calls often.

The 27th was the day they hit the quicksand. September

the 5th, John Borton digging footings. By September the 9th, Dale was noting that he is questioning the project budget of 75 to a hundred thousand dollars. I think these histories indicate he and John are there working. They're beginning to wonder just how much is it going to cost. They cut these buried cables. They hit quicksand. They're having all kinds of problems. They really wonder whether they're going to bring this project in at budget. Is 75 to a hundred thousand going to cover it?

September the 10th, revised cost figures. Dale concludes it will take $100,000 to reach a hundred percent completion. Talked to Dennis. Dennis not terribly shocked at that figure. The next day, September the 11th, talked to Dennis about a new plan. Tell Dennis we're going to try to work within budget, 30,000 to cash flow. The next day, September the 12th, Dennis Napieralski called. Card balance $3,474. What card? Could it be the Visa card that Dennis has given Dale Mason that's in evidence? Is that the card that has a balance of $3,474? Is that the balance Dennis wants to know about?

That's John Borton payday, noted that John Borton got a thousand dollars that day. That day or the next day, Dale has done some reviewing, and he has calculated that so far expenses have been $25,000. Two days later, December the 17th, Dennis picked up John at airport. Next day, September 18th, Dennis and Nancy are at the bank. You recall Mary Michaels remembered that Dennis came in, wanted to cash a $6,000 check. He wanted to get $6,000 in cash. The same day that Dennis cashes the $6,000 check, Dale notes in his history that Dennis, John and Dale talked percentages. They're all there. They can talk percentage. They attribute ten percent to John Borton. An entry, I think it's an abbreviation for expenses with no percentage, I would suggest that the conclusion to draw from that is that Dennis is going to pick up the expenses. Dale is there day to day to put in his labor. Dennis isn't there all the time. His contribution is to pay the expenses.

Next entry, after expenses, 50-50, Dennis, Dale. These are entries, daily entries, about what John is doing with Dale, with Dale's father in this construction effort in September and October of 1986.

Dale notes on October 31st, he called John Borton and Dennis, very depressed about the budget. Apparently this project wasn't coming in under budget. Everybody is depressed. But there is a big development. There is hope. On November 19th, Dale calls John. John calls Dale. Dale notes, babies ready now. Couple days later Dale leaves. He goes to California. he goes to California and returns with John. When they get back on the 27th, he notes that they made it back. Babies made it back. And by the next day, Dale notes that the babies are out of shock.

You heard the testimony that what we have are slips taken off mature plants, and they call them clones. Those are the little plants. Those are the little babies. That's how they start the plants. So Dale has noted that these clones, these babies, are ready in California, around the 19th of November. On the 22nd, he drives out, gets John, and they're back virtually non-stop. And the day they get back. Notes we made it. Babies made it.

Next day the babies are out of shock. Apparently the babies survived the trip. Kind of a cold time of the year to be driving around with small marijuana plants from the West Coast. But they're out of shock. They're going to be okay. John Borton stays then until December the 15th. And there are virtually daily entries about what John does while he is there. He's building these dollies. He is laying out the pipe.

There are entries as well that Nancy Mason is involved. On November the 25th, she notes she worked on the pipes all day. Nancy Mason notes on December 1st that Bob and Dale went to Minneapolis for a generator and a bobcat. You have the invoices in evidence regarding the $10,000 generator, 60,000 watts. You have the invoice about the bobcat, I think with the loader, the backhoe and tracks came to about $20,000. Dennis sent two checks, paid for that generator. Paid $5,000 down on the bobcat. Hasn't paid that off.

December the 2nd. There is a note by Dale that Dale, John and Nancy discussed pluses and minuses of the project in the partnership. Nancy notes in that first week of December that the generator's in the garage. Dale, John and I talked over our problems. There is a note by Nancy that on December the 6th, 1986, guys got the system up. Apparently the whole thing was

operational by then. Water comes in from the lake, goes into the tanks, the pumps pump it into the containers. Got clones there, got babies, now growing. Apparently the lights are up and operating. It's a go. The system is up on December the 6th. Significant. Nancy recorded it.

Dale notes that on the 13th of December, there is floral activity. On the 15th of December, he notes that the tallest of the plants is approximately 14 and a half inches high. By the 20th, five days later, tallest are 19 inches high. Pretty good system. Grew four and a half inches in four days. That's about an inch a day.

22nd. Nancy notes got check from Dennis. Went to town. Cashed it. Sent $1400 to John. You recall Mary Michaels' testimony. That was a $2800 check, 50-50 split. Sent 1400 to John Borton, kept the other half. Christmas Day John called, Dennis called. Dale notes the foliage showing some damage. On the 30th, Dale notes that Nancy and the kids are working on the pipes. The next day Dale notes that Kent is trying not to work. That's the day John Borton called, no check in the mail. So John hasn't got his check yet.

Nancy notes on January 1st, New Year's, that was the day Dennis called Gene Grell, New Year's day. That's the same day that Nancy notes Kent and Eric worked on the pipes. Dale got the lights set up, something about the rocks and the jugs. Next day Dale picked up Dennis at the airport. That's what he reports in his history. The 3rd of January, Dennis came to Minnesota to do more than meet with Gene Grell. Dale notes that he also came to help Nancy move containers onto the dollies on January the 3rd. Everybody talked about those steel frames for containing the white plastic containers, the dollies. Dennis helps Nancy move containers onto those on the 3rd.

On the 4th, Dales notes that Nancy and Dennis are preparing containers. Dale notes on the 7th that Dennis worked downstairs. On the 9th of January, Dennis's understanding of JB's ten percent equals costs first. Dennis is a businessman. He'd like to take those costs off before John gets his ten percent. It's a smaller ten percent. The 10th, Dale notes discussion of dollars and return and the percentage split, noted that approximately 100,000

to operation black, 80 percent into project until in black, 20 percent to split. That's the day Dennis leaves for Arkansas. Nancy notes that in her daytimer.

17th of January, John Borton called. He reported that his project had a poor return. 21st of January, Dennis is back, stays until the 28th. Dale notes on the 26th of January, Dennis drilled for wheels. He also notes only one box of jugs left. Apparently they had to get some more jugs. They're running out of jugs. This whole bugaboo about John Borton and his percentage comes up again on the 27th. Dales notes that Dennis and I talked about John Borton's percentage. They talk about that pretty regularly.

Nancy notes in her history that she is helping out, not full time, but a couple hours here, couple hours there. Her history is here. It will be in your deliberations with you. She also notes she has a bad back. She is getting treatment for her back.

We have another period in February. February the 14th, the histories report that John Borton has come back. And the report on the 19th of February that John and Dale go Duluth to Federal Express. You have got some Federal Express receipts in evidence. You also saw some overhead that relate to that day. And Agent Murphy testified that there were some calculations, some in code. But based upon his ten years' experience investigating these matters, he concluded that what Dale had recorded was that on February 19th, they had about 13 and a half pounds of finished product, and they [redacted] it up. They sent some to this Allen in California. He called while the agents were there searching on the 11th. He sent some to the East Coast. And John Borton, according to Agent Murphy, got about four pounds himself.

There is also another page in the notebook that explains that John Borton was entitled. I mean, the documents report that John was regularly being paid cash. But the notes also report that he was paid for labor. He was paid his ten percent, ten percent that Dennis is so concerned about. And he was also paid as a clone consultant. He was the expert about these clones.

Now then, we move up to day of the search. And we know that you heard testimony from Agent Hopps about these telephone calls he received. We have Mr. Napieralski's telephone

bill in evidence. And you will recall that there were two calls that came in while the agents were there searching. One was about 10:30 in the morning, and the other one was between one and two in the afternoon. And these agents were quick enough to get a tape recorder on these calls and they got them recorded. You heard the tape, and I think you will remember that the caller identifies himself as Dennis. And he is pretty shook up. I mean, for a controlled person to find out that somebody is on site that he didn't expect or didn't approve makes a controlled person excited. And he wants to know if this person on the phone has been in the basement. He asks about that quite early in the conversation. In fact, "Are you working in the basement?"

He tells this person Dale didn't tell him that there was somebody there that he didn't know about. He tells Agent Hopps, he says, I don't know — I think he did use the word nervous. I think it's clear he is surprised. Here is Dennis. He's calling up. He tells Hopps, he says, "It's my project. I'm the partner. Hand ons. This is mine. And I'm surprised, and I didn't approve. And have you been down in the basement? You weren't cleared through me." He has to know if he is impressed. He says, "How do you like it? Are you impressed?" Twice he makes the point to Greg, "Button those lips." He warns him not to tell anyone. He indicates to him that he won't be a problem if he doesn't tell anyone. And he says I'll be up soon.